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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GUADALUPE DURAN et al.,

Plaintiffs and Appellants,

v.

VICTOR MARTIN ULTRERAS et al.,

Defendants and Appellants.

2d Civil No. B247072  
(Super. Ct. No. 56-2011-00397516-  
CU-PA-VTA)  
(Ventura County)

Victor Martin Ultreras, Donald Beaver, and Kathy Beaver appeal an order granting a new trial to Guadalupe Duran, Salvador Duran, Jr., Jose G. Duran, Eva Duran, Leticia Duran, Elias Duran, Luz Elena Duran, and Maria Jesus Duran (collectively "the Duran family"). The jury found Victor Martin Ultreras was negligent, but that his negligence was not a substantial factor in bringing about the death of Salvador Duran (Duran). In a protective cross-appeal, the Duran family contends that a new trial is warranted because Ultreras's counsel committed misconduct in closing argument.

The trial court determined that, "after considering all the evidence, the jury clearly should have reached a different result once they made the threshold finding that Mr. Ultreras was negligent." Substantial evidence supports its determination. We affirm the order granting a new trial.

## FACTUAL AND PROCEDURAL BACKGROUND

On an October evening at about 7:00 p.m., Salvador Duran walked across Wooley Road in an industrial section of Oxnard. He was not in a crosswalk. He was wearing dark clothing. Walking northward, Duran crossed the two eastbound lanes and entered the first westbound lane, the "number one" lane closest to the center divider.

Ultreras was driving his Dodge Ram pickup truck in the other westbound lane, the "number two" lane closest to the curb. He was driving his 13-year-old daughter, Monique, home from a boxing lesson. They talked while Monique sent text messages on her cellular phone. Ultreras was traveling within the 45-mile-per-hour speed limit. He had taken Gabapentin for back pain, as prescribed, on the day of the collision.

Monique looked up from her phone for a moment and saw a figure (Duran) in the road ahead. She said, "Dad, Dad, there is a guy," and she looked back down at her phone. Ultreras did not initially see Duran or hear Monique. Monique testified that the figure looked like a "black shadow." When she first saw him, he was far enough away that she could see his whole body, including his feet.

When Monique looked up again, three or four seconds later, the man was "really close." The truck was about to hit him. Monique screamed, "Dad, Dad." Ultreras looked toward her and "he was like yelling, 'What,' because he did not know what [she] was yelling at." Monique pointed at the man standing in the roadway, and then put her head down. She felt the truck swerve before she felt the impact.

Ultreras testified that he heard Monique say, "Dad, Dad, watch out, there is a guy," as she "simultaneously, cover[ed] up," as if to prepare for an impact. Ultreras was "scared" because he "figured somebody was in front of the truck, and [he] didn't know where they were at." He made a "drastic swerve" to the left and straightened out the truck before it hit Duran. Ultreras estimated that two seconds passed from the time Monique said "Dad" until the impact. The front passenger side of the truck hit Duran. Duran died at the scene.

It was "horribly" dark. The lawsuit included claims against the City of Oxnard based on inadequate street lighting. Those claims were settled before trial.

Monique told police investigators that Ultreras could not see at night. She later said she was lying to protect him; she thought that if Ultreras did not see Duran, then he was not responsible for the collision. An optometrist examined Ultreras two weeks after the collision and two weeks before trial and concluded that his vision was adequate for night driving. Ultreras had suffered felony convictions for burglary and for introducing narcotics into prison.

Duran was 75 years old and had no health problems. The coroner ruled out suicide. Duran had an extensive history of alcohol-related offenses, but was not under the influence of drugs or alcohol at the time of the collision. His family testified that he worked for the family's catering truck business. He had been married for 60 years and had 9 living children and 25 grandchildren. Duran was imprisoned in 1993, and again in 2000. Family members testified they only remembered him being imprisoned once, about 20 years before the trial. His wife said he was imprisoned about 16 or 17 years before, but he was otherwise home every day. Family members said they were unaware of any problems with alcohol. To impeach this testimony, the trial court allowed evidence of Duran's criminal history over objection. The evidence included records of the two imprisonments, multiple alcohol-related arrests and convictions, and forms on which Duran had recorded his business address as his residence.

The Duran family's expert, Kenneth Alvin Solomon, Ph.D., testified that if Ultreras had exercised greater care in watching for pedestrians and other vehicles, he would have seen Duran in time to avoid him, and that if Ultreras had not suddenly swerved left, he also would have avoided him.

Ultreras's expert, Terrence Honikman, Ph.D., testified that Ultreras could not have avoided the collision, whether or not he swerved, because his headlights would not have illuminated Duran in time for Ultreras to stop. Honikman said that Monique may have looked up and seen Duran when he was briefly backlit by an eastbound vehicle.

Ultreras may have been attending to another driving task in that same moment.

Honikman said that if Duran stood in the middle of the road for five or six seconds before impact, it would suggest that Duran was attempting suicide.

Police investigators concluded that Duran was standing in the number one lane when the truck hit him. In deposition, Honikman said there was not sufficient information to determine where Duran stood, but he was probably north of the point in the number one lane that police investigators identified. At trial, Honikman said that Solomon's opinion about timing would place Duran in the number two lane, about three feet north of the number one lane dividing line, when the truck hit him. Duran's counsel addressed the trial court off the record during a break in this testimony, and the court allowed him to voir dire Honikman briefly about this new conclusion, but counsel did not clearly object on the record. On cross-examination, Honikman conceded that his new conclusion that Duran was in the number two lane required one to "completely discount" Ultreras's deposition and trial testimony that his truck was straight in the number one lane before the impact.

In violation of an in limine ruling, Ultreras's counsel referred to the settlement with Oxnard during cross-examination. The trial court sustained an objection and admonished counsel. In closing argument, counsel again referred to the settlement. Duran's counsel did not object. The Duran family contends there were other instances of misconduct in closing argument. We omit factual details concerning these contentions because our analysis renders them moot.

In a special verdict, the jury found Ultreras was negligent, but his negligence was not a substantial factor in causing harm to Duran. The Duran family moved for a new trial on the grounds that the jury's findings were irreconcilable and not supported by the evidence, that the trial court prejudicially erred when it allowed Honikman to testify that Duran was in the number two lane, and that the court erred when it admitted evidence of Duran's criminal history.

The trial court granted a new trial, because the jury's findings "cannot be reconciled to the evidence." The court wrote that Ultreras effectively neutralized the negligence claims that were based on inadequate vision or use of prescribed medication. It wrote, "The Court can see how a jury could conclude that Mr. Ultreras was negligent in not seeing Mr. Duran on the roadway in front of him (he was seen by the daughter in the front passenger seat[]), and in making a sudden and inopportune lane change just prior to the impact. What the Court cannot understand is how this negligence was not a cause of the impact between the Ultreras vehicle and Mr. Duran. To this extent, the evidence is insufficient to support the verdict. In the Court's view, after considering all the evidence, the jury clearly should have reached a different result once they made the threshold finding that Mr. Ultreras was negligent. [¶] The Court could accept a verdict that found the defendant non-negligent, or one that found both parties negligent, but the verdict in its present form is inconsistent, and not supported by the evidence."

#### DISCUSSION

The trial court did not abuse its discretion when it determined that "the evidence is insufficient to support the verdict."

We reverse an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict "only if there is no substantial basis in the record" for the reasons specified in the order. (Code Civ.Proc., § 657, subd. 7; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) We accord to the trial court's factual determinations the same deference we normally accord to a jury's factual determinations. (*Lane*, at p. 412.) We cannot find an abuse of discretion if the evidence is in conflict and a verdict for the moving party could have been reached. (*Ibid.*)

There is a substantial basis for the trial court's determination that if Ultreras was negligent, then his negligence was a substantial factor in bringing about Duran's death. Ultreras acknowledged he did not see Duran. Darkness did not prevent his passenger from seeing Duran well before the impact. He acknowledged that he swerved left before the impact. Solomon testified that if Ultreras had not suddenly changed lanes,

the collision would have been avoided. Honikman agreed that "[i]f Mr. Duran remained in the number one lane and there was no swerve by the Dodge, and it remained in the number two lane, then of course the accident would not have occurred."

This case is similar to *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121-122, in which a trial court did not abuse its discretion when it granted a new trial after a jury found an optometrist was negligent, but did not cause injury. According to the trial court, the "overwhelming evidence was that, had the defendant doctor not been negligent [in failing to detect glaucoma] . . . plaintiff's failure of eyesight would have been forestalled or delayed . . . ." (*Id.* at p. 121.) The trial court wrote that it would have accepted a verdict that attributed some negligence to the plaintiff, for failure to take care of himself, "[b]ut they couldn't have found no causation, under the evidence in this case." (*Id.* at p. 120.) Here too some negligence could be attributed to Duran for crossing the street in dark clothing outside a crosswalk. But if Ultreras was negligent, the record supports the trial court's determination that the jury should have found his negligence was a cause of the collision.

In *David v. Hernandez* (2014) 226 Cal.App.4th 578, a trial court abused its discretion when it denied a motion for new trial after a jury found that a truck driver was negligent, but did not cause a collision. In denying the motion, the trial court found that the defendant parked his truck in violation of a statute and that the truck would not have been in the appellant's path ""but for its having entered from the right, a position in which it had no legal right to be."" (*Id.* at p. 589.) Given those findings, the evidence was insufficient to support a finding that the truck driver's negligence was not a substantial factor in causing the collision. (*Id.* at p. 592.) Fortunately here, the trial court recognized the same problem and granted appropriate relief to the Duran family.

There is a substantial basis in the record for the trial court's determination that the verdict was not supported by sufficient evidence. Therefore, we need not determine whether the court might plausibly have reconciled the jury's findings on the theory that Duran was suicidal or another car would have hit him. Similarly, we need not

reach the question whether erroneous evidentiary rulings or attorney misconduct warranted a new trial. "On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated . . . ." (Code Civ.Proc., § 657, subd. 7.)

DISPOSITION

The order granting a new trial is affirmed. Costs are awarded to the Duran family.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Walsh, Judge  
Superior Court County of Ventura

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